85-1157

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

HILLTOP REALTY, INC.,
Petitioner,

vs.

CITY OF CLEVELAND HEIGHTS and
HEIGHTS COMMUNITY CONGRESS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the elements of standing for a city and an organization to bring claims under the Fair Housing Act are established by:

(a) the expenditure of funds by the city and the organization to determine if the defendant is violating the Fair Housing Act; or

(b) a vague threat of generalized harm in a large geographic area; or

(c) a hypothetical threat of resegregation in the school district.

2. Whether the district court's application of the continuing violation theory to unrelated incidents improperly permitted the consideration of events that occurred more than 180 days before the filing of plaintiffs' complaint.

3. Whether steering as defined and applied by the courts below violates the Fair Housing Act.

4. Whether the district court's interpretation of 42 U.S.C. §3604(a) as applied to petitioner violated petitioner's first amendment rights to commercial free speech by proscribing factual statements that did not directly result in the denial of housing.

PARTIES BELOW

The petitioner, Hilltop Realty, Inc., was the defendant-appellant before the Court of Appeals. Also named defendants in its Complaint were Vincent T. Aveni, John Mayfield, Val Vrana, Evelyn Gardner, Shirley Bernstein and Bruce Johanns. The district court dismissed all claims against all these individuals except Bruce Johanns. The Court of Appeals dismissed all claims against Bruce Johanns. Therefore, these individual defendants have no further interest in the outcome of the petition.

The respondents, City of Cleveland Heights and Heights Community Congress, were both plaintiff-appellees before the Court of Appeals.

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The petitioner Hilltop Realty, Inc. respectfully petitions for the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on October 2, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 774 F.2d 135 and is reprinted at A1 of the Appendix to this Petition. The opinion of the United States District Court, dated November 30, 1983, is unreported and is reprinted at A49 of the Appendix.

JURISDICTION

The judgment sought to be reviewed by the petition was rendered and entered on October 2, 1985. This petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2, Paragraph 1, Constitution of the United States.

First Amendment, Constitution of the United States.

42 U.S.C. Section 3604, Fair Housing Act, Title VIII, Civil Rights Act of 1968.

42 U.S.C. Section 3612, Fair Housing Act, Title VIII, Civil Rights Act of 1968.

(Text of above provisions are in Appendix, beginning at A209).

STATEMENT OF THE CASE

Hilltop Realty, Inc., now known as HGM/Hilltop Realty, Inc., ("Hilltop") is a licensed real estate brokerage firm with its principal office in Lyndhurst, Ohio, an eastern suburb of Cleveland. Plaintiff City of Cleveland Heights ("City") is a municipal corporation organized under the laws of the State of Ohio, with a population in 1980 of 56,438. The Heights Community Congress ("HCC") is an Ohio corporation not for profit composed of certain community groups and organizations operating in Cleveland Heights. One of the alleged objectives of the HCC is promoting Cleveland Heights as "an open and integrated community".

Respondents (along with a number of other individual plaintiffs whose claims were dismissed prior to trial) filed suit against Hilltop, its president, and five sales persons, alleging unlawful housing practices in violation of the Fair Housing Act, 42 U.S.C. §3604 and the Civil Rights Act of 1866, 42 U.S.C. §1982. The suit was based upon a program of monitoring compliance with fair housing laws by real estate firms operating in Cleveland Heights that the City and the HCC conducted from 1976 through 1978. The monitoring was conducted by means of "audits" or "checks" whereby black and white checkers posing as real home buyers would separately enter a real estate office or open house, ask to see homes and later report their observations of the conduct of the real estate sales person.

During this period, the respondents conducted 22 checks of Hilltop consisting of 44 contacts. Plaintiffs chose not to submit into evidence 11 of the 22 checks conducted of Hilltop. Plaintiffs introduced evidence of 11 checks at trial, consisting of 22 individual contacts.

The district court found that in six of the 22 individual contacts submitted into evidence, Hilltop salespersons violated 42 U.S.C. §3604(a). In addition, two Hilltop sales persons were held to have made statements that violated §3604(a) in two instances involving real home buyers purchasing in Cleveland Heights. The district court also found one violation of §3604(e) involving a solicitation. Of the eight violations of §3604(a) found by the district court, only one of them occurred within 180 days before the filing of plaintiffs' complaint. *See* District Court Memorandum and Order, filed November 30, 1983 and December 1, 1983 (hereinafter "MO".) (A49).

The Sixth Circuit Court of Appeals affirmed the district court's decision for the most part except that it reversed the district court as to the purported solicitation violation.

REASONS FOR GRANTING THE WRIT

I. THE PLAINTIFFS FAILED TO ESTABLISH THE REQUISITE ELEMENTS OF STANDING UNDER ARTICLE III OF THE CONSTITUTION.

The question of standing under the Constitution has been a perplexing question in fair housing cases. Some federal courts have interpreted standing in fair housing very liberally. *See, e.g., Hackett v. McGuire Bros., Inc.,* 445 F.2d 442 (3d Cir. 1971). This Court, however, recently has begun to set limits on standing in such cases. *See, e.g., Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982).[1]

1. These cases suggest that standing in fair housing cases should be limited to plaintiffs who have suffered distinct and palpable injuries through discrimination occuring within a compact neighborhood.

In *Warth v. Seldin,* 422 U.S. 490, 498 (1975) the Court explained the conflicting considerations in evaluating standing as follows:

> In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise . . . In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society. [citations omitted].

Standing to potential plaintiffs in particular has been denied because of the prohibition against the adjudication of generalized grievances and political or moral concerns not appropriately addressed by the courts. *Allen v. Wright,* 468 U.S. ....., 82 L. Ed. 2d 556, 569 (1984).

This court has held:

> [As an] irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision". [citations omitted].

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

In this case, plaintiffs failed to prove that they were injured in fact, or that any alleged injury was caused by the actions of Hilltop. Instead, they have shown only a most vague and abstract harm. Plaintiffs in effect requested the trial court to issue an advisory opinion that the defendant had violated the Fair Housing Act. However, plaintiffs utterly failed to prove how the particular violations injured them in the past or could injure them

in the future. *See e.g.* Memorandum and Order of the Court of July 1, 1985, at p. 36 granting attorney fees on the basis of plaintiffs' "moral" victory (A19). Plaintiffs also failed to demonstrate how such a vague and abstract injury could be redressed by a favorable decision.

This case presents the classic dilemma of standing in fair housing actions; while Congress intended standing to be construed liberally, the courts cannot be called upon to issue advisory opinions which merely serve to validate social policies rather than to adjudicate real controversies. *See Allen v. Wright,* 468 U.S. ....., 82 L. Ed. 2d 556, 569 (1984). This case offers the court the opportunity to resolve this dilemma by defining clear limits of standing in fair housing cases. Indeed, the case at bar is specifically the kind of case that the threshold requirement of standing should eliminate. In the absence of some degree of reasonable proof at trial of an actual injury to plaintiffs at the hands of Hilltop, the district court should have dismissed the suit. *Accord Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 115, n.31 (1979).

The district court, however, erroneously held that plaintiffs did not have to prove at trial the allegations to to support standing[2] (MO at 194, n.105; A196). The court

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2. The district court further erred in suggesting that in general, the criteria for determining standing is less stringent when the relief being considered is injunctive or declaratory relief rather than money damages (MO at 202; A202). The standing requirement of Article III, as interpreted in 200 years of judicial history, makes no distinction between standing for monetary damages and standing for injunctive or declaratory relief. No court has ever made such distinction.

Many, if not most, fair housing cases involve requests for injunctive and declaratory relief, often in addition to compensatory damages, yet this court has applied the same test of standing to those claims as is applicable to claims involving solely monetary damages. *Cf. Warth v. Seldin,* 422 U.S. 490, 496 (1975); *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 34 (1976).

of appeals, in affirming this portion of the district court's decision, similarly held that plaintiffs need only prove at trial that they were theoretically in a position to be injured. *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 139 (6th Cir. 1985) (A1, 6-7). Such a conclusion is clearly contrary to well-established law.

In *Gladstone* for instance, this court emphasized that the allegations relating to standing remain to be proved at trial. The court stated:

> Although standing is a matter generally dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the Complaint necessary for standing will be supported adequately by the evidence adduced at trial.

Id. at 115, n.31. *See also Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (court did not limit its examination of the standing question to the allegations of plaintiff's complaint, but rather reviewed the evidence presented at trial), *Maryland v. Louisiana*, 451 U.S. 725 (1981) (court reviewed the findings of the Special Master in determining standing). *HOPE, Inc. v. County of DuPage, Illinois*, 738 F.2d 797, 808 (7th Cir. 1984). ("While the elements of standing must initially be sufficiently alleged in the pleadings, they must also be established through the introduction of evidence in order to obtain any judicial relief.")

While the district court erroneously held to the contrary position, it did present an alternative ground upon which to base standing, i.e., that the record provides facts which are sufficient to support plaintiffs' pretrial allegations of actual and threatened injury (MO at 194, n.105; A196).

The district court pointed to several instances of harm allegedly sustained by the City which purportedly gave it standing (MO at 194-201; A195-201). In the case of the City, these purported injuries were (1) the expenditure of City funds for housing programs, (2) the threatened "resegregation" of Cleveland Heights, (3) the threatened diminishment of the City's tax base and (4) actions taken by the school district to offset disproportionate black enrollment in certain schools. In the case of the HCC, the injury was the expenditure of HCC funds in monitoring real estate companies, in particular, Hilltop. However, there was no evidence that any of these supposed effects, if they occurred at all, constituted actual or threatened injury traceable to the actions of Hilltop.

A. The City Cannot Create Its Own Injury and Then Use Such Injury to Establish Standing

As to the City, the district court argued that the City had voluntarily expended its funds to fight what it perceived and feared to be illegal real estate practices. The court in effect concluded that the voluntary expenditure of funds by the City to investigate fair housing actions constituted a distinct and palpable injury giving, conferring it standing to sue whomever it was investigating (MO at 197; A198).

Such a finding is obviously circuitous, since it would enable any government unit or organization to investigate any misconduct it suspected by anyone, then use the investigation as the "injury" allegedly inflicted by such a defendant. Such a position is without precedent. The injury required by the Constitution must be independent of the injury which the City itself created in order for a justiciable controversy to exist.

B. A Vague, Unproven Threat of Generalized Harm in a Large Geographic Area Is Not Sufficient to Establish Standing

The district court found that the City could suffer an injury as a result of the threat of resegregation (MO at 197-98; A198-99). However, the district court failed to find any facts which proved that such a threat was posed by the acts of Hilltop. This Court in *Bellwood* held that a city might claim a cognizable injury if "perceptible increases in minority population *directly* attributed to the racial steering [by the defendants] precipitate an exodus of white residents." 441 U.S. at 110 (emphasis added). However, the district court again erred as a matter of law. While a threatened injury, if direct, can give rise to standing, no such direct threat existed here due to the actions of Hilltop.[3]

During the time period for which violations against Hilltop were charged (1976-1980) the City of Cleveland Heights was not losing its racial stability. Indeed, the evidence in the record shows that during the period the City was a model of stability and racial integration. From 1977 to 1980, the average annual increase in black popula-

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3. This court also held that a significant reduction in property values during the period of the alleged acts of discrimination may constitute an injury sufficient for standing. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110-11 (1979). The district court found that threatened "forces of resegregation if allowed to proceed unchecked, would probably cause diminishment of the City's tax base as recognized in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110-11 (1979)." (MO at 197-98; A198-99).

However, at trial, there was no showing that there was any probability of reduction of the City's tax base. Indeed, the evidence of the City demonstrated that property values in Cleveland Heights showed a substantial increase during the period in question which, in fact, exceeded the increases in every neighboring suburb but one (MO at 198, n.107; A198-99).

tion was only .3%. The percentage of black population in Cleveland Heights (24.9%) as shown by the 1980 census was almost precisely the same as the county-wide black percentage of 24.6% (*See* MO at 6; A53). The City can hardly claim injury due to segregation produced by Hilltop's action when its racial composition is virtually identical to that of the county as a whole. Indeed, it would be more logical to infer that the actions of all real estate agents in Cleveland Heights, taken in aggregate, were actually benefiting the City since the City seems to have, during the period of alleged injury, achieved a remarkable level of integration and stability.

In the instant case, moreover, the City's claim of injury affecting a vast city-wide area with a population of almost 60,000 people is too tenuous and vague to support standing. *Cf., Gladstone Realtors v. Village of Bellwood,* 441 U.S. at 114 (1979) (only a 12 x 13 square block neighborhood affected); *Trafficant v. Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972) (only one apartment complex affected), *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 376-378 (1982) (allegations that a single act of discrimination injured resident plaintiffs throughout the Richmond, Virginia area were implausible as a basis to establish standing). Especially in view of the fact that what testimony was produced came primarily from checkers, any injury allegedly suffered by the residents of the City was clearly hypothetical at best. Such a hypothetical injury, if it is recognizable at all, is clearly not subject to redressability by the courts.

C. The Hypothetical Threat of Segregation in the School District Is Not Sufficient to Establish the City's Standing

In a final attempt to find some basis for standing of the City, the district court cited the *Bellwood* reference to school segregation as a possible injury caused by racial steering (MO at 198-99; A199). The district court found that the Cleveland Heights-University Heights School District had taken certain actions to offset increases in the black enrollment in certain elementary schools. However, it is undisputed that the school district is a governmental entity completely distinct from the City of Cleveland Heights and that actions taken by the school district had no effect upon the City government. Moreover, there was no evidence of any kind that the increase in black enrollment or that any expenditures by the school district were in any way caused by the acts of Hilltop or that the Court could take any actions to redress the injury, if it had occurred.

D. The HCC's Expenditure of Funds to Monitor Hilltop Is Not Sufficient to Establish Standing

In *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 365 (1982), this Court held that any plaintiff, including presumably a community organization, was required to prove at trial the requisite facts needed to show standing. The Court required the organization to prove both injury to itself and a causal relationship between the alleged violations and the alleged injury.

In this case, the district court found that the HCC had conducted monitoring of real estate firms to determine compliance with fair housing laws and had expended

funds to finance such activities (MO at 201-02; A202). However, the district court erroneously determined that such monitoring, in and of itself, was sufficient to establish standing in a fair housing case (MO at 201-02; A202). As with the City, the HCC cannot create the injury upon which it bases standing. See Part II A *supra*. The HCC cannot rely on the remote possibility that the actions of defendants might make its activities more difficult. In *HOPE, Inc. v. County of DuPage, Illinois*, 738 F.2d 797 (7th Cir. 1984).

Indeed, there was no evidence that the conduct of Hilltop perceptibly impaired the HCC's ability to carry out its activities, as was suggested to justify standing in *Havens*. The fact that the HCC voluntarily engaged in the monitoring of Hilltop real estate practices in no way shows a bona fide injury to HCC. The district court acknowledged the HCC's lack of proof of injury caused by Hilltop. "Rather, the fault lies in HCC's failure to produce evidence that causally connects Hilltop's section 3604 violations to HCC's expenditure of monies . . . ." (MO at 200-02; A200-01). Inexplicably however, the court still found that the HCC had standing. Such a holding is clearly in error.

E. The Federal Courts Cannot Be Used to Issue Advisory Opinions

Limitations on standing are central to the constitutional limits on the courts' powers. As this Court stated in *Allen v. Wright*, 468 U.S. ....., 82 L. Ed. 2d 556, 567 "Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition of a litigant's raising another person's grievances more appropriately addressed in the legislative branches . . .".

Perhaps, nowhere more than fair housing has the definition of standing been more difficult. By its nature,

fair housing cases often involve institutional plaintiffs and defendants, diffuse, vague and prospective injuries, and difficult-to-trace causation. Nevertheless, the federal courts cannot be used to prospectively define the housing demographics of a community by issuing prophylactic orders against any party who is in a position to influence such demographics. Such concerns are utterly beyond the courts' powers to redress. The federal courts' role is to adjudicate true controversies between adversarial parties when harm has occurred or is imminently threatened.

In the instant case, rather than adjudicating a true controversy, the district court has issued an advisory opinion finding certain technical violations by Hilltop. Such an action by the district court is clearly outside of the judicial function as defined by the Constitution.

II. THE DISTRICT COURT'S APPLICATION OF THE CONTINUING VIOLATION THEORY TO UNRELATED INCIDENTS IMPROPERLY PERMITTED THE CONSIDERATION OF EVENTS THAT OCCURRED MORE THAN 180 DAYS BEFORE THE FILING OF PLAINTIFFS' COMPLAINT.

The continuing violation theory is an exception to statutes of limitations that has frequently been applied by the courts in civil rights cases. The theory allows the trial court to consider allegedly improper acts that occurred prior to the limitations date because those acts are said to be part of some larger violation that continued into the limitation period.

Problems have arisen in the application of this concept. Commentators have noted confusion on the parts of the lower courts who have rendered "inconsistent and often

irreconcilable decisions." Jackson and Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits,* 67 GEO. L. J. 811, 812 (1979). Greatly increased judicial use of the continuing violation theory has been discerned; however, this increased use has been attended with considerable confusion and inconsistency. Note, *Title VII and the Continuing Violation Theory: A Return to Congressional Intent,* 47 FORDHAM L. REV. 894, 899 (1979). The instant case is a prime example of a trial court applying this confusing doctrine in such an unlimited manner that the statutory limitations period becomes absolutely meaningless.

A. There Must Be a Related Practice of Illegal Conduct in Order for the Continuing Violation Theory to Apply

The statutory provision under which the plaintiffs sought relief, 42 U.S.C. §3612(a), contains a 180-day statute of limitations. The district court permitted the plaintiffs to prove acts allegedly in violation of the Fair Housing Act that occurred as early as August 26, 1976 despite the fact that the Complaint was not filed until March 7, 1979, nearly three years later.[4] The Court of Appeals for the Sixth Circuit then compounded this error by ruling that the issue was simply a question of fact on which the district court had not committed clear error. 774 F.2d at 141 (A8-9).

This Court considered the continuing violation theory in the context of Title VIII in *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982). In *Havens* four plaintiffs brought

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4. Although not the subject of any violation finding, evidence of events occurring as early as 1974 was permitted by the district court as bearing on so-called "corporate intent." (MO at 131-35; A148-51).

suit against a real estate broker of rental apartments and one of its employees alleging racial steering and discrimination in the rental of housing. The Court held that the claims of one plaintiff alleging that the defendants provided false housing information on four separate occasions prior to the 180-day period were barred by the statute of limitations. However, the Court refused to dismiss certain other claims, holding that, where plaintiffs challenged not just one incident of conduct violative of the Fair Housing Act but "an unlawful practice that continued into the limitations period", the complaint is timely if it is filed within 180 days of the last violation. *Havens Realty Corp.*, 455 U.S. at 381.[5] Thus the *Havens* court recognized that the continuing violation theory is limited in application to those cases where the plaintiff challenges a practice of violations.

The "practice" element that distinguished which pre-limitations violations could be proven in *Havens* is essential if the statutory time limits are to retain meaning. Requiring that a practice of related violations be proven fulfills the condition of a present violation that this Court established in *United Airlines v. Evans*, 431 U.S. 533 (1977).[6] An expansive application of the continuing violation theory could eviscerate entirely the Congressional policies that underlie the 180-day limitation period. By requiring that plaintiffs prove a related practice of violations before ex-

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5. The *Havens Realty* case reached this Court by virtue of a Court of Appeals' reversal of a motion to dismiss. Thus, the plaintiffs' allegations of an illegal practice were sufficient, and they were not required to prove their allegations.

6. Although *Evans* was a Title VII case, there is no reason to distinguish the Title VIII statute of limitations in this regard. Indeed, if anything, plaintiffs herein, as organizational plaintiffs with large monetary and personnel resources, should be better able to comply with strict statutory limitations than the individual plaintiffs upon whom enforcement of Title VII falls for the most part.

panding the time frame to be examined helps to obviate these concerns. *Note, Continuing Violations of Title VII: A Suggested Approach*, 63 MINN. L. REV. 119, 144-145 (1978). There can be no continuing violation where the incidents are unrelated.

B. The District Court Improperly Applied the Continuing Violation Theory Without Finding a Related Practice of Illegal Conduct by the Defendants

The district court found eight violations of §3604(a). Seven of these violations occurred prior to the 180-day limitation period; only one violation took place during the limitation period.[7] Rather than analyzing whether the incidents were related and formed a practice extending into the limitation period, the district court simply assumed that it could consider any alleged violations as long as one of them occurred within 180 days of the filing of the complaint. In the view of the district court:

> Of the eight section 3604(a) violations, one . . . occurred within the 180-day period prior to the filing of plaintiffs' complaint. As in *Havens*, 455 U.S. at 381, if "at least one" of the eight incidents "occurred within the 180-day period", then "the unlawful practice . . . continue[d] into the limitations period." Therefore, the "complaint is timely", and each of the incidents is rendered timely.

(MO at 188; A191). The court never analyzed whether a practice existed, but rather assumed that one timely occurrence automatically rendered every other occurrence timely, whether those occurrences were related or not.

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7. One of the pre-limitation violations of §3604(a) also constituted a violation of §3604(c).

Had the district court considered whether a practice of illegal conduct existed, it would not have concluded as it did that the continuing violation theory was applicable. It is clear from this Court's opinion in *Havens* that if violations are not related, the continuing violation theory does not apply. In *Havens* this Court held that the claims of one of the tester plaintiffs were time-barred, because the four instances in which she allegedly received false information constituted "isolated occasions". These incidents were not related to the steering incidents that occurred within the limitations period, and therefore the continuing violation theory was inapplicable. 455 U.S. at 381.

In *Havens* this Court did apply the continuing violation theory to some of the plaintiffs' claims, i.e., those that formed "an unlawful practice that continued into the limitations period". The violations to which the theory was applied were alleged to be "a continuing pattern, practice and policy of unlawful racial steering". The acts were very similar in nature (steering of blacks away from an apartment complex owned by one defendant and into an integrated complex also owned by the same defendant), involved one very specific location and occurred within a four month period.

In contrast to the *Havens* situation, the case at bar presents pre-limitations incidents that are unrelated to the single violation that occurred within 180 days of the filing of the complaint. Of the seven pre-limitation violations found by the district court, six incidents involved steering. The single post-limitation violation was not a steering incident, but rather involved a failure to serve. Although there was one pre-limitation failure to serve, it occurred nearly a year and one-half before the post-

limitation failure to serve, involved a different real estate agent and was totally unrelated to the failure to serve that occurred within the limitations period. Moreover, the one incident that took place within the limitations period involved a realtor, who was not involved in any way with the seven pre-limitations violations. Conversely, none of the agents who participated in pre-limitation violations had any part in the one post-limitation violation.

In determining when there is sufficient continuity between the violations to constitute a practice as required by *Havens,* it is relevant to examine the so-called "pattern or practice" cases, which are closely analogous to continuing violations. Jackson and Matheson, *supra,* at 835. The underlying rationale for the continuing violation theory is that the "pattern or practice" is a present violation (as required by this Court in *United Airlines v. Evans,* 431 U.S. 533 (1977)) because it stretches into the limitations period, even though some specific incidents occurred pursuant to the practice more than 180 days before the complaint was filed.

The leading pattern or practice case in the Title VII area is *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977) in which this Court stated:

> Because it alleged a systemwide pattern or practice of resistence to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice.

Id. at 336. Lower courts that have considered Title VIII pattern or practice actions have come to similar conclusions.

E.g., United States v. L & H Land Corp., 407 F. Supp. 576 (S.D. Fla. 1976) (holding that no pattern or practice occurs if the discriminatory conduct of the defendant was an isolated, accidental or peculiar departure from an otherwise non-discriminatory norm). *Id.* at 580.

In the instant case, there was no proof of, nor did the district court require proof of, a discriminatory norm. In fact, the evidence adduced at trial showed that in most instances presented by the plaintiffs, there was no violation of the Fair Housing Act. The district court specifically found that, with respect to seventeen alleged violations, there was no steering into or away from Cleveland Heights. Moreover, defendants presented significant evidence that showed that the norm was non-discrimination.

Allegation of a continuing violation does not constitute "a talismanic or shibboleth term automatically relieving a claimant of any obligation to comply with the statutory time requirement" for the filing of a complaint. *Hill v. AT&T Technologies, Inc.*, 731 F.2d 175, 179-80 (4th Cir. 1984) (Title VII case). Only by requiring strict adherence to the *Havens* requirement that there be a related practice of illegal conduct before the continuing violation theory applies can the courts avoid having the limitations rule being swallowed by the continuing violation exception. Petitioner requests this Court to clarify the essential elements for application of the continuing violation theory.

III. STEERING AS DEFINED AND APPLIED BY THE COURTS BELOW DOES NOT VIOLATE THE FAIR HOUSING ACT.

The district court found six incidents of so-called "steering" and, on that basis and without further analysis,

ruled that the defendants had violated 42 U.S.C. §3604(a). Such a holding is improper, because steering is not a statutory violation *per se* and may be illegal only if defendants have acted so as to make unavailable or deny dwellings to individuals because of race.

The district court adopted and applied the following definition of steering:

> The use of a word or phrase or action by a real estate broker or salesperson which is *intended* to influence the choice of a prospective property buyer on a racial basis. (Emphasis in original).

(MO at 26; A68). This definition was taken directly from the decision of another district court in *Zuch v. Hussey*, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977). The *Zuch* court applied the steering label to the conduct of real estate agents who, by means of racially derogatory remarks about an integrated area of Detroit, strongly discouraged white home buyers from purchasing homes in that area. The *Zuch* court then concluded that steering is a violation of 42 U.S.C. §3604(a) as a matter of law. *Id.* at 1048. Although this Court has specifically declined to rule whether steering, as defined by *Zuch*, is illegal, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, n.7 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 115, n.32 (1979), lower courts have unquestioningly applied *Zuch* and held that steering is a *per se* violation of the Fair Housing Act.

Clearly, however, there can be no violation of §3604(a) unless housing was made unavailable or denied on the basis of race. The district court in the present case analyzed the incidents as to which evidence was presented, found that those incidents constituted steering as defined by *Zuch*, and without any further analysis, ruled that the

incidents were statutory violations. Without any proof that housing was made unavailable or denied, such a holding is plainly in error.

The court of appeals affirmed the district court on this issue, holding that a statement or act that would have a discriminatory effect and was made with an intent to steer would violate §3604(a). 774 F.2d at 140 (A8). Such a holding rewrites the statute. This function is best left to Congress.

IV. THE DISTRICT COURT'S FINDINGS THAT CERTAIN STATEMENTS VIOLATED 42 U.S.C. §3604(a) ARE CONTRARY TO THIS COURT'S RULINGS GRANTING FIRST AMENDMENT PROTECTION TO FACTUAL COMMERCIAL SPEECH.

A. The District Court Did Not Employ the Applicable Standards of Review for Proscribing Commercial Speech

The standards applied by the district court to determine whether certain oral statements made by petitioner's sales associates constituted steering allegedly proscribed by §3604(a) violated petitioner's first amendment rights to commercial speech. This Court has never determined what statements constitute steering. Nor has this Court determined that steering violates any provision of the Fair Housing Act (See Part III, *supra*).

The statements proscribed by the district court constitute commercial speech which is to be afforded first amendment protection. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Proscription of commercial speech contravenes the first amendment absent a showing of each of the criteria of *Cen-*

tral Hudson Gas & Electric Corp. v. Public Services Committee of New York, 447 U.S. 557 (1980):

1. The proscribed speech is not false or misleading;
2. The state demonstrates a substantial state interest in proscribing the speech;
3. The statute directly advances the substantial government interest; and
4. There are no lesser alternatives which could likewise further the substantial interest.

In determining what statements constitute steering, the district court disregarded the *Central Hudson* four-part test. As a result, the district court's findings that such statements constitute unlawful steering violate the first amendment rights of petitioner.

1. The district court proscribed speech that was not false or misleading

Because the commercial speech of Hilltop was not false or misleading, it must be given first amendment protection. *Central Hudson Gas,* 447 U.S. 557; *Linmark Associates, Inc., v. Willingboro,* 431 U.S. 85, 91 (1977). Commercial speech is considered illegal only if it is employed to promote the purchase of illegal items or investment in illegal activities. *Casbah, Inc. v. Thone,* 651 F.2d 551 (8th Cir. 1981), *cert. denied* 455 U.S. 1005 (1982). The purpose for which these statements were made was to sell homes, obviously not an illegal purpose.

Moreover, these statements were not misleading, but rather were statements of true facts and occurrences. The district court noted six statements of fact which it found to be violations of §3604(a):

1. A statement that a white couple was lucky "because they would get a better deal" on homes in a neighborhood since they were white (MO at 37; A77).

2. A statement concerning the location "of the houses [in the neighborhood] where the white people lived and where black people lived." (MO at 36; A76).

3. The description of one neighborhood as being undesirable because "even blacks were hesitant to buy in the neighborhood" though it was predominantly black (MO at 39; A78).

4. A statement that "some white home buyers are buying [in East Cleveland] for the lower prices." (MO at 50; A87).

5. The question asked of a buyer "whether he was aware that the Forest Hills area was more than half ack." (MO at 99; A124).

6. A question asked of a white buyer of "how do you feel about black specifically." (MO at 103; A127).

In addition, the district court found that one statement of fact indicated an intent to steer when a buyer was told "that the children of a black family that had moved into Lyndhurst were beaten up in the high school and that the family had to move." (MO at 109; A132). None of these statements was found to be false or misleading by the district court, or in any way denied purchasers the opportunity to purchase homes in the areas in question. Therefore, this speech was subject to first amendment protection.

2. Proscribing this speech does not further a substantial governmental interest, and in fact, is contrary to the substantial governmental interest in the dissemination of consumer information

Nowhere in its opinion did the district court identify any substantial governmental interest to be served by proscribing the factual information that Hilltop sales

associates gave to customers. By failing to identify the governmental interest, it was impossible for the district court to determine whether an interest was directly advanced by proscribing the statements made by Hilltop agents.

Moreover, proscription of this information actually hindered the governmental interest in disseminating consumer information. Consumers have a right to know as much information as possible about the products or services which they desire to purchase:

> The protection afforded (by the first amendment) is to the communication, to its source and to its recipients both. Because of this consumers' right to commercial speech, even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some information is better than no information at all.

Central Hudson Gas, 447 at 562. This is particularly true when the important and expensive purchase of a home is at stake:

> [I]nformation, which pertains to sales activity in [the city], is a vital interest to [city] residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families.

Linmark Associates, Inc., 431 U.S. at 96-97. The proscribed information in this case concerned the economic and social attractiveness of neighborhoods, the strengths or weaknesses of schools and the bargaining position of the buyers, all of which is important consumer information. Therefore, the proscription of factual information in this case without a determination of what governmental interest would be advanced by such proscription violates the first amendment.

3. The district court's ruling did not properly determine whether a governmental interest was directly advanced by prohibiting the information which Hilltop disseminated

By ruling that information which "tended to influence" consumers could be censored (MO at 112; A134), the district court ignored the *Central Hudson Gas* requirement that a prohibition directly advance the government's interest. As stated in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496, *reh'g denied*, 456 U.S. 950 (1982), commercial speech cannot be limited unless it is "expressly directed" toward acts contrary to substantial governmental interests. By requiring merely a showing that the statements would "tend" to influence, the court applied a much lesser standard than the "direct" standard in *Central Hudson Gas* and *Hoffman*.

Moreover, "[a]fter *Virignia Pharmacy Board* it is clear that commercial speech cannot be banished because of an *unsubstantiated belief* that its impact is 'detrimental' ". (emphasis added). *Linmark Associates, Inc.*, 431 U.S. at 92, n.6. The district court found that "the statistical evidence presented in this case is not sufficient to permit a finding of 'significant discriminatory effect' " (MO at 27; A68). Since the district court's broad brush definition of steering did not directly advance any substantial governmental interest, it violated petitioner's first amendment rights to commercial speech.

In the specific case of housing information, this Court has admonished against such a broad brush interpretation:

> The [City] has sought to restrict the free flow of this data because it fears that otherwise homeowners will make decisions inimicable to what the [city] views as the homeowner's self-interest and the corporate

> interest of the township: they would choose to leave town. . . . If dissemination of this information can be restrictive, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that the disclosure would cause the recipients of the information to act "irrationally". *Virginia Pharmacy Board* denies government such sweeping powers.

Id. at 96-7. Thus, the "tendency" standard of the district court violated the first amendment requirement of a direct relationship between the government interest and the proscription of speech.

4. Lesser alternatives exist to further fair housing interests

Lesser alternatives exist to proscribing truthful and otherwise not unlawful statements under the guise of steering. The substantial interest in prohibiting housing discrimination can still be served if limited to the dissemination of false or misleading speech which directly results in denying housing or making housing unavailable to prospective purchasers. Such a limitation would still allow the government to prevent discriminatory statements as defined in §3604(c) and (d); *e.g.*, statements indicating a racial preference or untrue statements that homes are unavailable. Such a limitation would further the interests of preventing housing discrimination, without censoring the dissemination of factual information protected by the first amendment.

B. The District Court's Definition of Steering Is Unconstitutionally Vague and Results in a Chilling Effect on Realtors

The definition of steering employed by the district court results in an unconstitutionally vague interpretation

of what is prohibited under §3604(a), which in turn has a chilling effect on the dissemination of information to potential home purchasers. As this Court stated in *Gooding v. Wilson*, 405 U.S. 518 (1972), prohibition of speech which merely tends to lead to illegal activity is unconstitutional.

> [H]ow infinitely more doubtful and uncertain are the boundaries of an offense including a diversion tending to a breach of the peace' . . . .

Gregory v. Chicago, 394 U.S. 111, 119 (1969) (Black, J., concurring). Yet, the district court applied this very language when it interpreted §3604(a) as prohibiting statements which "would tend to influence, based on race, the housing choices of a reasonable prospective home buyer." (MO at 112; A134). Thus, the district court ignored this Court's holdings that speech may be censored only if it is likely to produce an imminent illegal activity. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The testimony before the Court itself provides examples of the chilling effect this opinion might have on the dissemination of otherwise protected factual information. For example, testimony of the potential purchasers indicated that the purchasers themselves found information regarding unrest in the local high school valuable in deciding whether to purchase the home (MO at 110; A132-33). Yet, the real estate agent expressed fear in telling them about the conditions in the high school because "it would be called steering" (MO at 112; A134). This demonstrates that that district court's vague definition of "steering" could have a chilling effect on the dissemination of information which potential purchasers desire to know.

CONCLUSION

For all of the above reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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